Supreme Court, U. S.
FILED
FEB 5 1979
MICHAEL RODAK, JR., CLERK

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1978

No. 78-1093

THEODORE ROBERT BUNDY and
MILLARD C. FARMER, Jr.,

Petitioners,

vs.

JOHN RUDD, In His Capacity as Judge for the Circuit Court of the Second Judicial Circuit in Leon County, Florida, et al.,

Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

JIM SMITH
Attorney General

RICHARD A. HIXSON
Assistant Attorney General
Department of Legal Affairs
Civil Division
Tallahassee, Florida 32304
904/488-1573

TABLE OF CONTENTS

TABLE OF AUTHORITIES	ii-iii
QUESTION PRESENTED	2
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	2
STATEMENT OF THE CASE	4
REASONS FOR DENYING THE WRIT:	
I. THE FIFTH CIRCUIT COURT OF APPEALS PROPERLY APPLIED THE PRINCIPLES OF YOUNGER v. HARRIS, 401 U.S. 37, 91 S.Ct. 746, 27 L.Ed.2d 669 (1971), AND THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT IN DECLINING TO REQUIRE THE PRO HAC VICE ADMISSION OF AN OUT-OF-STATE ATTORNEY IN STATE CRIMINAL PROCEEDINGS.	5
II. THIS CASE DOES NOT PRESENT SPECIAL OR IMPORTANT REASONS FOR GRANTING A WRIT OF CERTIORARI	7
CONCLUSION	9
CERTIFICATE OF SERVICE	10
APPENDIX	A 1-4

TABLE OF AUTHORITIES

CASES

Board of Regents v. Roth
408 U.S. 564 (1972) 6

Bundy v. Rudd
581 F.2d 1126 (5th Cir. 1978) 4,7

Flynt v. Leis
574 F.2d 874 (6th Cir.1978) 7,9

Leis v. Flynt
___ U.S. ___
Case No. 77-1618
(Decided Jan. 15, 1979) 6,8

Younger v. Harris
401 U.S. 37, 91 S.Ct. 746,
27 L.Ed.]d 669 (1971) 5

OTHER	PAGE
Rule 19, United States Supreme Court Rules	8,9
Rule 19(b),United States Supreme Court Rules	8
Rule 2.060(b), Fla. Rules of Judicial Administration	7
Art. I, §1, Fla. S.Ct. Rules Relating to Admissions to The Bar	3,6

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1978

No. 78-1093

THEODORE ROBERT BUNDY and
MILLARD C. FARMER, JR.,

Petitioners,

vs.

JOHN RUDD, In His Capacity as Judge for the Circuit Court of the Second Judicial Circuit in Leon County, Florida, et al.,

Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

Opinion Below

The opinion of the United States Court of Appeals for the Fifth Circuit is reported at 581 F.2d 1126 (5th Cir. 1978).

Jurisdiction

The jurisdictional requisites are adequately set forth in the Petition.

QUESTIONS PRESENTED

I. Whether the asserted right of an out-of-state attorney to appear pro hac vice in a Florida court is an interest protected by the Due Process Clause of the Fourteenth Amendment.

II. If such an interest is protected by the Fourteenth Amendment, whether Petitioner was afforded due process under the circumstances of this case.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The case involves the Fourteenth Amendment to the United States Constitution.

2. This case involves Rule 2.060(b) of the Florida Rules of Judicial Administration:

> "Foreign Attorneys. Upon motion filed with a court showing that an attorney is a member in good standing of the bar of another state and that, under the rules of comity of the other state a member of The Florida Bar is permitted to appear in that state, attorneys of other states may be

> permitted to appear in particular cases in a Florida court. A request for an appearance shall be before oral arguments in an appellate court proceeding and before trial in a trial court. Attorneys of other states shall not do a general practice unless they are members of The Florida Bar in good standing."

3. This case also involves Art. I, §1 of the Florida Rules of the Supreme Court relating to Admissions to the Bar:

> The admission of attorneys to the practice of the profession of law is a judicial function. All individuals who seek the privilege of practicing law in the State of Florida shall submit to Part I and Part III of the Florida Bar Examination and shall provide such score from submission to Part II, as specified in Article II, Section 10(c) of these Rules. The Court promulgates the rules hereinafter set forth and adopts and approves the Code of Recommended Standards of Bar Examiners, adopted by the American Bar Association on May 21, 1958, promulgated and approved by the National Conference of Bar Examiners and the Association of American Law Schools, except where

such standards are inconsistent with the rules of this Court or the rules of the Board hereinafter established.

STATEMENT OF THE CASE

This litigation concerns the asserted right of Petitioner, Millard Farmer, an attorney licensed to practice in the State of Georgia, to represent Petitioner, Theodore Bundy, a criminal defendant accused of capital offenses in Florida, in the criminal proceedings against Petitioner Bundy in the Florida trial court. The facts of this case are adequately set forth in the opinion of the district court as adopted by the Fifth Circuit Court of Appeals, Bundy v. Rudd, supra, 581 F.2d at 1128-1129.

Subsequent to the decision of the Fifth Circuit Court of Appeals, the Florida Supreme Court on December 22, 1978, directed the assignment of another State trial judge to replace Respondent Rudd, the presiding Florida trial judge at the time this case arose. A copy of the order of the Florida Supreme Court is appended hereto. (A. 1-4.)

REASONS FOR DENYING THE WRIT

I.

THE FIFTH CIRCUIT COURT OF APPEALS PROPERLY APPLIED THE PRINCIPLES OF YOUNGER v. HARRIS, 401 U.S. 37, 91 S.Ct. 746, 27 L.Ed.2d 669 (1971), AND THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT IN DECLINING TO REQUIRE THE PRO HAC VICE ADMISSION OF AN OUT-OF-STATE ATTORNEY IN STATE CRIMINAL PROCEEDINGS.

Petitioner in this action sought an injunction from a federal district court enjoining on-going State criminal proceedings until such time as Petitioner Farmer, an out-of-state attorney, was granted pro hac vice admission to represent Petitioner Bundy, a defendant under capital indictment in Florida. As to the claims of Petitioner Bundy, the courts below recognized that such claims could be asserted in the State proceeding, and accordingly denied intervention under the principles of Younger v. Harris, supra. This issue is not asserted by the Petitioners herein.

As to the claims of Petitioner Farmer, Petitioners assert that the notice, hearing, and reasons stated by the Florida trial court for denial of pro hac vice admission did not comport with the due process requirements of the Fourteenth Amendment.

The courts below held that Petitioner Farmer's interest in pro hac vice admission was not a protected interest under the Due Process Clause of the Fourteenth Amendment, and even assuming such interest was protected, the circumstances of this case comported with fundamental due process requirements.

This court has recently held that the asserted right of an out-of-state attorney to appear pro hac vice does not fall within those interests protected by the Due Process Clause of the Fourteenth Amendment in the summary reversal of Leis v. Flynt, ___ U.S. ___, case No. 77-1618 (decided January 15, 1979). As the court observed in Flynt, supra, the Due Process Clause of the Fouteenth Amendment ". . . extends various procedural safeguards to certain interests 'that stem from an independent source such as state law. Board of Regents v. Roth, 408 U.S. 564, 577(1972).'" Leis v. Flynt, supra, ___ U.S. at ___, slip op. at 4.

In the case at hand, the courts below recognized that under Florida law, as in Ohio, an out-of-state attorney has no claim of entitlement derived from state statute or legal rule to appear pro hac vice in Florida courts. The Florida Supreme Court has specifically prohibited reciprocation, Art. I, §1, Fla. Rules of

the Supreme Court Relating to Admissions to the Bar, and Rule 2.060(b) of the Florida Rules of Judicial Administration expressly commits such admission to the discretion of the State trial court. Under these circumstances, as recognized by the courts below, there exists no independent source for such asserted rights of Petitioners, and the interest sought to be protected does not fall within the ambit of the Due Process Clause of the Fourteenth Amendment.

Moreover, Petitioners, in the courts below relied heavily upon the now reversed decision of the Sixth Circuit in Flynt v. Leis, 574 F.2d 874 (6th Cir. 1978), and the courts below held that even if the decision in Flynt were correct in its application of the Fourteenth Amendment, that the Petitioners in this case were given adequate notice, opportunity to be heard, and a statement of reasons for denial of pro hac vice admission to comply with due process. Bundy v. Rudd, supra, 581 F.2d at 1132. Accordingly, even if Flynt had not been reversed, the petitioners in this case have been afforded adequate procedural protection.

II.

THIS CASE DOES NOT PRESENT SPECIAL OR IMPORTANT REASONS FOR GRANTING A WRIT OF CERTIORARI.

Rule 19 of the Supreme Court Rules provides in part that a writ of certiorari ". . . will be granted only where there are special and important reasons therefor." Rule 19(b), S.Ct.R. then sets forth an indication of the character of the reasons considered in the disposition of petition for writ of certiorari:

> (b) Where a court of appeals has rendered a decision in conflict with the decision of another court of appeals on the same matter; or has decided an important state or territorial question in a way in conflict with applicable state or territorial law; or has decided an important question of federal law which has not been, but should be, settled by this court; or has decided a federal question in a way in conflict with applicable decisions of this court; or has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this court's power of supervision.

Here, this Court has recently in Leis v. Flynt, supra, by summary disposition decided the issues raised by Petitioners, and the opinion of the

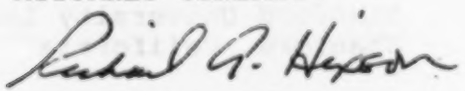
Fifth Circuit Court of Appeals is in accordance with the Flynt decision. Accordingly, the issues sought to be asserted herein do not meet the requirements of Rule 19, supra, and the petition should be denied.

CONCLUSION

For the foregoing reasons, Respondents submit that the questions upon which this cause depend are insufficient to support the issuance of a writ of certiorari. Respondents accordingly move this Court to deny the Petition for Writ of Certiorari.

Respectfully submitted,

JIM SMITH
ATTORNEY GENERAL



RICHARD A. HIXSON
Assistant Attorney General

Department of Legal Affairs
Civil Division
The Capitol
Tallahassee, Florida 32304
904/488-1891

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Respondents' Brief in Opposition to the Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit was forwarded by U. S. Mail to the following on the _____ day of February, 1979:

Jack Greenberg
James M. Nabbit, III
Joel Berger
John Charles Boger
Suite 2030
10 Columbus Circle
New York, New York 10019

Anthony G. Amsterdam
Stanford University Law School
Stanford, California 94305

RICHARD A. HIXSON

APPENDIX

Supreme Court of Florida

No. 53,411

RECEIVED
DEC 26 1978
ATTORNEY GENERALS OFFICE
Docketed
12-26-78
Florida Attorney General

THEODORE R. BUNDY, Petitioner,

vs.

JOKI A. RUDD, as Circuit Judge of the Second Judicial Circuit in And for Leon County, Florida, Respondent.

[December 22, 1978]

PER CURIAM.

This case is before the Court on a petition for a writ of prohibition to prevent the respondent from continuing to exercise jurisdiction as trial judge in certain criminal proceedings presently pending against the petitioner in the Leon County Circuit Court. Because the case is one in which a sentence of death might ultimately be imposed, we have jurisdiction. Art. V, § 3(b)(1), Fla. Const., see Teina v. State, 352 So.2d 853 (Fla. 1977).

By indictment filed on July 27, 1978, petitioner was charged with two counts of murder in the first degree, three counts of attempted murder in the first degree, and two counts of burglary of a dwelling. After entering a plea of not guilty petitioner filed a written motion to disqualify the trial judge, setting forth various incidents which had transpired during the course of the proceedings, and alleging that respondent had exhibited such prejudice as to place petitioner in fear that he would not receive a fair trial. The motion was accompanied by the supporting affidavits of petitioner, of the public

defender appointed to represent him, and of four members of the public defender's staff who had participated in the preparation of petitioner's defense.

On November 20, respondent entered an order denying the motion for disqualification on the ground that the motion was legally insufficient. The order went on to explain, and in some respects controvert, the specific factual allegations contained in the motion. On the same day, petitioner filed a motion for reconsideration, to which he attached another affidavit of the public defender essentially denying that respondent's explanatory account of certain events was truthful. When that motion was similarly denied, again with explanation, petitioner instituted the present action in an effort to prevent his impending trial from commencing as scheduled on December 4.

Upon initial consideration, we determined that the petition on its face demonstrated a preliminary basis for relief and entered an order directing respondent to show cause why the motion and supporting affidavits were not legally sufficient. Having now considered all the relevant documents filed in this proceeding, we conclude that petitioner is entitled to the relief requested.

Regardless of whether respondent ruled correctly in denying the motion for disqualification as legally insufficient, our rules clearly provide, and we have repeatedly held, that a judge who is presented with a motion for his disqualification "shall not pass on the truth of the facts alleged nor adjudicate the question of disqualification." Fla. R. Crim. P. 3.230(d); see, e.g., Dickenson v. Parks, 104 Fla. 577, 140 So. 469 (1932); Suarez v. State, 95 Fla. 42, 115 So. 519 (1928); Theo. Hirsch Co. v. McDonald Furniture Co., 94 Fla. 135, 113 So. 317 (1927). When a judge has looked beyond the mere legal sufficiency of a suggestion of prejudice and attempted to refute the charges of partiality, he has then exceeded the proper scope of his inquiry and on that basis alone established

BEST COPY AVAILABLE

grounds for his disqualification. Our disqualification rule, which limits the trial judge to a bare determination of legal sufficiency, was expressly designed to prevent what occurred in this case--the creation of "an intolerable adversary atmosphere" between the trial judge and the litigant. See Department of Revenue v. Golder, 332 So.2d 1, 7 (Fla. 1975) (On Reconsideration).

Once a basis for disqualification has been established, prohibition is both an appropriate and necessary remedy. Brown v. Rowe, 96 Fla. 289, 118 So. 9 (1928). Accordingly, the writ of prohibition must issue directing respondent to disqualify himself in all proceedings presently pending against the petitioner. We assume, however, that the formal issuance of the writ will be unnecessary.

The chief judge of the Second Judicial Circuit shall assign another judge within the circuit to preside over proceedings pending against petitioner, unless he shall deem it appropriate to request the chief justice of the Supreme Court to assign a qualified judge from without the circuit, pursuant to the provisions of Article V, Section 2(b) of the Florida Constitution.

It is so ordered.

ENGLAND, C.J., BOYD, OVERTON, SUNDBERG, HATCHETT and ALDERMAN, JJ., Concur

Case of Original Jurisdiction - Prohibition

Michael J. Minerva, Public Defender, Tallahassee, Florida,

for Petitioner

Robert L. Shevin, Attorney General; and Miguel A. Olivella, Jr., Assistant Attorney General, Tallahassee, Florida,

for Respondent

see

7 8

1 0 5 2